**ASIA COMMERCIAL FINANCE (M) BHD. & ANOR.**

**v.**

**DEVELOPMENT & REALTOR SDN. BHD.**

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[ORIGINATING SUMMONS NO. 24 (31)-695-86]
28 FEBRUARY 1992

***CONTRACT:*** *Sale by public auction - Whether contract comes into being when hammer falls - Completed contract of sale - Purchasers had tendered the balance purchase price within stipulated time - Same rejected by solicitors for the chargee - Issue whether sale completed.*

***CIVIL PROCEDURE:*** *Sale of land by auction - Whether the notice of hearing of the chargor's appeal properly served on the purchaser - Onus of proving that notice served - Whether proper - Whether chargor had discharged onus which lay upon him of proving such service - Standard of prudence required of intending bidders in determining preliminary searches - Whether bidders should also conduct final search or can rely on a search conducted by officers of the Court - Whether purported lodging of caveat could constitute sufficient notice to the purchasers - Purchaser denied opportunity of being heard.*

***LAND LAW:*** *Charge - Dispute between a purchaser at a sale of lands by public auction - Whether SAR order grounded on reserve price report of 14 months interval - Need to be set aside to determine - Fresh fair market value - Disparity of price - Substantial - Whether purchasers may intervene - Whether the sale properly conducted because it was held at gross undervalue - Whether negligence on the part of the chargee - Whether sale to be set aside - No infirmity in the order for sale - Section 256 of NLC 1965.*

***TORT:*** *Whether chargee owes a duty to the chargor - Proximity of mortgagor and the mortgagee - Standard of behaviour - Whether imposed by equity and (or) law - Test to apply - "Cuckmere test" - Equity is recognition of chargor's interest in surplus arising from sale - Whether negligence stems from duty imposed by equity or law.*

This case concerns a dispute between a purchaser ("the purchaser") at a sale of immovable property ("the property") by public auction held pursuant to an order for sale made under s. 256 of the National Land Code 1965 ("the Code") and a chargor ("the chargor").

*Inter alia*, on 3 July 1989, the Senior Assistant Register ('the SAR') of the High Court fixed the reserve price for the sale by public auction of the property at RM140,000 and at the material time neither the chargor nor his Counsel were present although duly served. In fixing the reserved price, the SAR relied on a valuation report dated 3 May 1988 by Messrs. C.H. Williams Talhar & Wong Sdn. Bhd. wherein the opinion was expressed that the open Market Value, as at the date with vacant possession and free from all encumbrances was RM140,000.

On 5 October 1989, the chargor's appeal against the decision of the SAR fixing the reserve price was heard. It was contended that, since the public auction had been held some 14 months after the date of the valuation report dated 3 May 1988. On the basis of which the SAR had fixed the reserve price of the property at RM140,000 a fresh valuation report ought to have been obtained by the chargee not more than three months before the auction date in order to determine what the fair market value was.

Counsel then went on to refer to a report by the chargor's values Messrs. Jones, Lang & Wootton dated 22 September 1989 wherein the open market value of the property with vacant possession and free from all encumbrances as at 12 July 1989, on the basis that certain development plans were approved was said to be RM360,000 and if not approved RM310,000.

Following a subsequent appeal, the Court set aside the auction sale and directed that a fresh application for directions be made by the chargor to the SAR to fix a new auction date for the property at a new reserve price.

On 10 October 1989, by a letter dated the same date and addressed to the solicitors for the chargee, the purchaser had tendered the balance of the purchase price but the tender was rejected by them upon the ground that the auction sale had been set aside. The chargee apart from returning the purchaser's cheques representing the balance purchase price also refunded the 10% deposit purchase price.

On 17 November 1989, the purchaser applied for leave to intervene and to be added as a party to these proceedings and to set aside the order made by the Court on 5 October 1989 setting aside the auction sale held on 12 July 1989.

On 8 March 1990 the chargee filed a fresh summons for directions before the SAR to fix a new reserve price and a new auction date. However, this application had been adjourned pending the decision on the purchaser's application to reinstate the sale by public auction held on 12 July 1989.

On 11 June 1990 the Court, after hearing Counsel for the purchaser, the chargor and the chargee granted the purchaser's application for leave to intervene and to be added as a party.

The learned Judge then heard the purchaser's application to set aside the order of the Court dated 5 October 1989 allowing the chargor's appeal and in effect, seeking to reinstate the sale by public auction held on 12 July 1989.

**Held:**

**[1]** The Court held that there was no suggestion here that the chargee had no power to sell by reason of non-compliance with the statutory conditions. But, the point taken is that the sale was not properly conducted because it was at a gross undervalue, thereby implying negligence on the part of the chargee, although it is not suggested that the undervaluation. On this ground it was said that the sale to the purchaser should be set aside.

**[2]** It is indisputable that at a sale by public auction a contract comes into being when the hammer falls. In the present case, it was accepted on all sides that there had been not only a contract of sale but a completed contract of sale for the purchaser had tendered the balance purchase price within the time limited under the conditions of sale but the same was rejected by the solicitors for the chargee for the reasons stated.

**[3]** In the three stages of a sale transaction, namely, contract, completion and registration, the Court is concerned with the second stage. The Court is also concerned with a case where the chargor accepts that although there had been due compliance by the chargee with the statutory conditions for a sale laid down in the Code and it had exercised a legitimate power of sale he contends that the power had been exercised improperly because the sale was at a gross undervalue.

**[4]** There is no infirmity in the order for sale. None was even alleged. There was no suggestion that the chargee's power of sale had not arisen because there had been no default by the chargor under the charge which would go to the core of the chargee's claim or that there had been non-compliance with the notice requirements of the Code.

**[5]** The learned Judge held the view, that the onus of proving that OCL, the bidder had notice of the hearing of the chargor's appeal was upon the chargor. The affidavit of the managing director of the chargor CCK, merely assumed that OCL had been informed of the date of hearing of the appeal for he had no personal knowledge of that fact. The basis of that assumption was the letter of the chargor's solicitors dated 17 August 1989. Sending is not the same as serving. His statement on the question of service was hearsay. There was no proof that the notice had been served upon OCL, and so the chargor had failed to discharge the onus which lay upon him of proving service.

**[6]** On the question whether a registered proprietor of land could caveat his own land, there are two conflicting decisions of the High Court which dealt with the point. It was held in *Eu Finance Berhad v. Siland Sdn. Bhd. (Intervener)* that a registered proprietor, merely as registered proprietor, was not entitled to caveat his own land. This view was followed by the Court.

**[7]** In the case of a statutory sale by public auction held pursuant to an order for sale under s. 256(3) of the Code, the preliminary searches by an intending bidder would be necessary to comply with the standard of prudence required of him. However, the learned Judge held that it would not be necessary for an intending bidder to conduct the final searches because it could be said that he was entitled to rely on the fact that the sale was being conducted under the supervision of an officer of the Court.

**[8]** The learned Judge held the view that, the purported lodging of the caveat in this case did not constitute notice to the purchasers of the chargor's appeal. The purchaser was entitled to actual notice of the appeal.

**[9]** The issue which arises for decision upon this application is what is the remedy to which the chargor is entitled assuming he is correct in his contentions that the sale was at a gross undervalue. The issue of the appropriate standard of case owed by the chargee to the chargor is not free from difficulty.

**[10]** It is settled law that a chargee in exercising the power to sell under the Code owes a duty to a chargor which flows from equity's recognition that a chargor has an interest in the surplus (if any) arising from the sale.

**[11]** In the present case, the learned Judge preferred the "*Cuckmere* test" where it was stated that the obligation of the mortgagee was to be based on not a standard of behaviour imposed by equity but on legal duty based on the tort of negligence and stemming from the proximity of the mortgagor and the mortgagee.

**[12]** On the merits of the sale, matters which require scrutiny by the Court are the organisation of the sale and in particular the price received. There is authority for saying that a sale at an undervalue is not automatically set aside. There is also authority for saying that the concept of market value is relative and depends upon the market in question.

**[13]** Upon the facts in the present case, although it is true that there is a wide disparity in the opinion evidence of the rival experts as to the true market value of the property at the time of the auction sale, it is not worthy that neither expert has expressed his opinion on the basis of a statutory sale by public auction. This Court is not prepared to hold that the sale if it was at an undervalue at all, was at such undervalue as to indicate fraud or want or proper standards of case as to justify the sale being set aside.

**[14]** The learned Judge was of the view that the chargor's lack of diligence had been deplorable, he never attended the hearing before the SAR when the reserve price was fixed and never obtained a stay after filing his notice of appeal. He offered no satisfactory proof

of service of notice of hearing of his appeal upon OCL whose nominee the purchaser was. He did however lodge an invalid caveat, but that was one month after the auction sale when there was already in being a binding contract of sale and purchase.

**[15]** The Court being satisfied that the purchaser was denied the opportunity of being heard at the chargor's appeal, the purchaser is entitled to reinstatement of the sale by public auction of the property held on 12 July 1989.

*[Sale of property by public auction reinstated. Decree for payment of the balance of purchase price to chargee. Order in terms of purchaser's application.]*

**Cases referred to:**
*Tse Kwong Lam v. Wong Chit San [1983] 3 All ER 54* ***(cit)***
*Barry v. Heider [1914] 19 CLR 197* ***(cit)***
*Sinclair v. Hope Investments [1982] 2 NSWLR 878* ***(cit)***
*Re an Application by Haupiri Courts Ltd. [1969] NZLR 353* ***(cit)***
*Great West Permanent Loan Co. v. Friesen & Ors [1925] AC 208* ***(cit)***
*Frazer v. Walker [1967] 1 AC 567* ***(cit)***
*Mir Bros Projects Pty Ltd. v. 1924 Pty Ltd. [1980] 2 NSWLR 907* ***(cit)***
*Eu Finance Bhd. v. Siland Sdn. Bhd. (Intervener) [1989] 2 MLJ 24* ***(cit)***
*Hiap Yiak Trading Sdn. Bhd. & Ors. v. Hong Soon Seng Sdn. Bhd. [1990] 2 CLJ (Rep) 117* ***(cit)***
*Kennedy v. De Trafford [1897] AC 180* ***(cit)***
*Warner v. Jacob [1881] 20 Ch D 220* ***(cit)***
*Pendlebury v. Colonial Mutual Life Assurance Society Ltd. [1912] 13 CLR 676* ***(cit)***
*Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd. [1971] Ch 949* ***(foll)***
*Tse Kwong Lam v. Wong Chit Seng [1983] 1 WLR 1349* ***(cit)***
*Dimmick v. Pearce Ivestment Pte. Ltd. [1980] 43 FLR 235* ***(cit)***
*Forsyth v. Blundell [1973] 129 CLR 477* ***(cit)***
*The Australian and New Zealand Banking Group Ltd. v. Bangadilly Pastoral Co. Pty. Ltd. [1978] 52 ALJR 529* ***(cit)***
*Davis v. Taytlor [1948] 48 SR (NSW) 514* ***(cit)***
*Campbell v. Campbell [1916] 21 CLR 308* ***(cit)***
*Khoo Cheong Puay v. The Overseas Banking Corp. Ltd. & Ors. [1935] MLJ 93* ***(cit)***

**Legislation referred to:**
National Land Code 1965, ss. 256(3), 265(1), (3), 259(3)(a), 323(1)(a)
New South Wales Act [Aust], s. 72
Real Property Act 1909 (NSW) [Aust], ss. 3 , 12(1), 57, 74F(2)

**Other source referred to:**
*Caveating one's own Land: Cold Comfort for the Registered Proprietor,* Teo Keang Ford [1991] 1 MLJ xxxiv

*For the plaintiff - Chen Mun Peng; M/s. Chew, Tan & Lim*
*For the 1st defendant - Abu Haniffa; M/s. Sykt. Abu Haniffa*
*For the 2nd defendant - Gan Teik Chee; M/s. Gan Teik Chee & Ho*

**JUDGMENT**

**Edgar Joseph Jr J:**

This case concerns a dispute between a purchaser (the purchaser) at a sale of immovable property (the property) by public auction held pursuant to an order for sale made under s. 256 of the National Land Code 1965, (the Code) and a chargor (the chargor).

The history of the matter which calls for the consideration of the Court may be shortly stated thuswise:

On 28 July 1986, the chargee had commenced a charge action by way of the originating summons herein seeking the enforcement of a charge by way of an order for sale of the property such charge having been created in its favour by the chargor on 6 August 1985.

On 28 January, 1988, the Court granted the order for sale and made the further orders required under s. 256 of the Code including an order fixing the date of the auction sale, the chargor being absent although duly served.

On 6 July 1988, the chargee filed a summons in chambers for a new auction date.

On 16 March 1989, the Court in the presence of Counsel for the chargor and the chargee, fixed 12 July 1989, as the new auction date, no objection having been raised by Counsel for the chargor.

On 3 July 1989, the Senior Assistant Registrar of the High Court fixed the reserve price for the sale by public auction of the property at RM140,000; neither the chargor nor his Counsel being present although duly served. In fixing the reserve price, the Senior Assistant Registrar relied on a valuation report dated 3 May, 1988, by Messrs C. H. Williams, Talhar & Wong Sdn. Bhd. wherein the opinion was expressed that the open market value, as at that date, with vacant possession and free from all encumbrances, was RM140,000.

On 6 July, 1989, Messrs. Daud & Partners, solicitors for the chargor filed a notice of appeal against the decision of the Senior Assistant Registrar fixing the reserve price at RM140,000 but they omitted to apply for a stay of execution.

On 12 July 1989, pursuant to the order of this Court, the sale by public auction proceeded and after 11 bids the property was knocked down to one Ooi Chooi Lye at a price of RM140,600 who duly paid the 10% deposit stipulated in the conditions of sale. Completion was to be on 12, October 1989. A certificate of result of sale was signed by the auctioneers appointed by the Court Messrs C.H. Williams, Talhar & Wong and a memorandum was annexed thereto signed by the solicitors for the chargee confirming the sale and acknowledging the receipt of the 10% deposit of the purchase price.

On 15 July 1989, Ooi Chooi Lye nominated the purchaser as the buyer and it was not disputed that this nomination related back to the date of the auction.

On 4 August 1989, Messrs Gan Teik Chee & Ho had replaced Messrs. Daud & Partners as solicitors for the chargor, and on 4 August, 1989, they filed an application for an order of stay of proceedings pending the determination of the appeal against the decision of the Senior Assistant Registrar made on 3 July, 1989, fixing the reserve price at RM140,000.

On 11 August 1989, the chargor, through his solicitors Messrs. Gan Teik Chee & Ho, had lodged a caveat to prevent any transfer of the property to the purchaser.

It was alleged by the chargor, though subsequently denied by the purchaser, that by a letter dated 17 August 1989, being Exh. CCK 4 to Encl. 40, his solicitors Messrs Gan Teik Chee & Ho, had put both the chargee's solicitors and the said Ooi Choon Lye, on notice of the date of hearing of his appeal and advised them of his caveat, a copy of which was annexed.

On 5 October 1989, the chargor's appeal against the decision of the Senior Assistant Registrar fixing the reserve price was heard.

It was pointed out by Counsel for the chargor that as the public auction had been held some 14 months after the date of the valuation report dated 3 May 1988 by Messrs. C.H. Williams, Talhar & Wong on the basis of which the Senior Assistant Registrar had fixed the reserve price of the property at RM140,000, a fresh valuation report ought to have been

obtained by the chargee not more than three months before the auction date in order to determine what the fair market value was. Counsel then went on to refer to a report by the chargor's valuers Messrs. Jones, Lang & Wootton dated 22 September 1989, wherein the open market value of the property with vacant possession **and free from all encumbrances as at 12 July 1989**, on the basis that certain development plans were approved was said to be RM360,000 and, if not approved, RM310,000.

On the other hand, Counsel for the chargee drew attention to the great disparity in the opinions as to the fair market value expressed in the two valuation reports aforesaid and added that the chargor had only himself to blame for, although duly served, neither he nor his solicitors had attended the hearing of the summons for directions before the Senior Assistant Registrar when the reserve price had been fixed at RM140,000.

In the event, the appeal was allowed; the Court set aside the auction sale and directed that a fresh application for directions be made by the chargor to the Senior Assistant Registrar, to fix a new auction date for the property at a new reserve price. There were also consequential orders that the chargor was to bear all costs and expenses incurred by the chargee by reason of the public auction which had been held on 12 July 1989. In consequence, the chargor's application for a stay of proceedings was not proceeded with.

On 10 October 1989, by a letter dated the same date and addressed to the solicitors for the chargee, the purchaser had tendered the balance of the purchase price but the tender was rejected by them upon the ground that the auction sale had been set aside by the Court on 5 October, 1989. The solicitors for the chargee apart from returning the purchaser's cheques representing the balance purchase price also refunded the 10% deposit purchase price.

On 17 November, 1989, the purchaser applied for leave to intervene and to be added as a party to these proceedings and to set aside the order made by this Court on 5 October, 1989 setting aside the auction sale held on 12 July, 1989.

On 8 March, 1990 the chargee filed a fresh summons for directions before the Senior Assistant Registrar to fix a new reserve price and a new auction date. However, this application had been adjourned pending the decision on the purchaser's application to reinstate the sale by public auction held on 12 July, 1989.

On 11 June, 1990, the Court, after hearing Counsel for the purchaser, the chargor and the chargee granted the purchaser's application for leave to intervene and to be added as a party.

I then heard the purchaser's application to set aside the order of this Court dated 5 October, 1989 allowing the chargor's appeal and, in effect, seeking to reinstate the sale by public auction held on 12 July 1989.

Those being the facts I must now proceed to examine the legal position and then to state my conclusions.

Although the chargee has only a statutory charge and is not the registered proprietor of the land which he purports to transfer, he may do so by reason of the provisions of the Code provided he complies with the conditions laid down therein. Once those conditions are complied with and completion has duly taken place the proper registering authority is obliged by s. 259(3)(a) of the Code to register the Certificate of Sale and the sale is as valid and effective as if it had been carried out by the registered proprietor chargor. If, on the other hand, the statutory conditions have not been complied with the chargee has neither the right nor the power to sell the land and if he purports to do so any certificate of sale issued

pursuant thereto would be void and of no effect but if the proper registering authority registers such a Certificate of Sale, a *bona fide* purchaser for value without notice would take a good title.

There is, however, no suggestion here that the chargee had no power to sell by reason of non-compliance with the statutory conditions. But, the point taken is that the sale was not properly conducted because it was at a gross undervalue, thereby implying negligence on the part of the chargee, although it is not suggested that the purchaser had any hand in or was a party to the undervaluation. On this ground, therefore it was said that the sale to the purchaser should be set aside.

It is indisputable that at a sale by public auction a contract comes into being when the hammer falls. In the present case, it was accepted on all sides that there had been not only a contract but a completed contract of sale for the purchaser had tendered the balance purchase price within the time limited under the conditions of sale but, as already noted, the same was rejected by the solicitors for the chargee for the reasons stated.

So, in the three stages of a sale transaction, namely, contract, completion and registration, I am here concerned with the second stage. I am also concerned with a case where the chargor accepts that although there had been due compliance by the chargee with the statutory conditions for a sale laid down in the Code and it had exercised a legitimate power of sale he contends that the power had been exercised improperly because the sale was at a gross undervalue.

First of all, I must correct a misconception on the part of Counsel for the chargor. He had submitted that when on 5 October, 1989, the Court had allowed the appeal of the chargor against the decision of the Senior Assistant Registrar dated 3 July, 1989, fixing the reserve price for the sale by public auction at RM140,000 and had directed the Senior Assistant Registrar to fix a fresh reserve price, the effect of the allowance of the appeal was to result in the order for sale under s. 256(1) of the Code being set aside. That submission is, of course, quite untenable. There is no infirmity in the order for sale. None was even alleged. There was no suggestion that the chargee's power of sale had not arisen because there had been no default by the chargor under the charge which would go to the core of the chargee's claim or that there had been non-compliance with the notice requirements of the Code.

It was contended by Counsel for the purchaser that the sale by public auction held on 12 July 1989 was held according to the requirements of the Code, uninhibited by any caveat, injunction or order for stay.

It was further contended that the chargor's appeal to set aside the sale was heard on 5 October 1989, that is to say nearly three months after the auction sale, and it was heard without notice to the purchaser. The alleged service of the letter dated 17 August 1989 from the solicitors for the chargor mentioning the date of hearing of the appeal, upon Ooi Choon Lye, the successful bidder, whose nominee the purchaser was, was challenged. In his affidavit affirmed on 2 February 1990, Ung Beng Khoon the managing director of the purchaser had in para. 4 said this: "We do not know if notice was served on Ooi Choon Lye. There is no proof of such notice". It was therefore said that as no proof of service had been adduced by the chargor, it had to be assumed that there had been no service on Ooi Choon Lye, and so the purchaser had been denied the opportunity of being heard with the result that the order of this Court dated 5 October 1989, allowing the chargor's appeal had to be set aside *ex debito justicia* irrespective of the merits.

It was also contended that the purchaser had bought the property in good faith at a public auction supervised by the Senior Assistant Registrar, an officer of the High Court, and that any loss suffered by the chargor could be compensated for by an award of damages as illustrated by the Privy Council case of *Tse Kwong Lam v. Wong Chit San* [1983] 3 AER 54.

In reply, Counsel for the chargor contended that the affidavit of Chiew Chee Kin, the managing director of the chargor, dated 9 January 1990, being Encl. 40, showed that Ooi Choon Lye had been informed of the date of hearing of the chargor's appeal by the chargor's solicitors' letter dated 17 August, 1989.

In addition, it was said that the chargor had lodged a caveat supported by the usual statutory declaration which mentioned the chargor's appeal and its date of hearing. This, it was said, was notice to the whole world and although the caveat had been lodged about one month **after** the auction sale was held this was before the completion date, so that the purchaser could have discovered that there was an appeal by the chargor pending and the date thereof. In the circumstances, the purchaser must be deemed to have had notice of the hearing of the appeal by the chargor and so was bound by any order made in that appeal.

In my view, the onus of proving that Ooi Choon Lye had notice of the hearing of the chargor's appeal was upon the chargor. The affidavit of the managing director of the chargor Chiew Chee Kin, merely **assumes** that Ooi Choon Lye had been informed of the date of hearing of the appeal, for he had no personal knowledge of that fact. The basis of that assumption was the letter of the chargor's solicitors dated 17 August, 1989.

A perusal of that letter does not suggest that it was sent by registered post or was delivered by hand. Indeed, there is nothing in it to even show that it had been sent by ordinary post and even if it had been, **sending** is not the same as **serving**. Chiew Chee Kin was evidently relying on what his solicitors had told him regarding the letter of 17 August, 1989; so, as I have said, he had no personal knowledge as to whether or not Ooi Choon Lye had been informed of the date of hearing of the appeal. His statement on the question of service was hearsay. In view of the challenge mounted by the purchaser on the question of service, I would say that there was no proof that the notice had been served upon Ooi Choon Lye, and so the chargor had failed to discharge the onus which lay upon him of proving such service.

The next point to consider in the context of the submission of Counsel for the chargor was whether or not the fact that the chargor had lodged a caveat about one month after the sale by public auction but before the date of completion meant that the purchaser was deemed to know of the appeal and its date of hearing.

Before I proceed to consider this point, it occurred to me that it might be open to question whether a registered proprietor of land could caveat his own land.

In New South Wales, Australia, in practice the registered proprietor is regarded as competent to lodge a caveat against his own land. In *Barry v. Heider* [1914] 19 CLR 197, a High Court decision, on appeal from the Supreme Court of New South Wales, plaintiff claimed that he had been induced by fraud to sign a transfer and lodged a caveat to forbid registration of that transfer. The High Court made no adverse comment on that procedure, which is now given statutory force by s. 74F(2) of the Real Property Act 1909.

*Sinclair v. Hope Investments* [1982] 2 NSWLR 878 - also a New South Wales case - is authority for the proposition that a mortgagor has a caveatable interest where the mortgagee had entered into a contract in breach of the duty in exercising the power of sale. It was an equitable interest sufficient to found a caveat under the relevant legislation.

In *Re an Application by Haupiri Courts Ltd.* [1969] NZLR 353 - a New Zealand case - Richmond J held that a registered proprietor cannot base a caveat against dealings with the land of which he is registered as proprietor solely upon the ground of his registered ownership, but must establish some set of circumstances which give rise to an interest in the land distinguishable from that which he holds as registered proprietor: "In such circumstances it would seem that the fact that he is the registered proprietor of an estate or interest under the Act may not prevent him lodging a caveat": at 357. His Honour considered that the then New South Wales Act s. 72 was more apt to confer the right to caveat upon a registered proprietor than the language of the New Zealand counterpart, but it would appear that the use in the New Zealand Act of the phrase "otherwise howsoever" should have led to an opposite result. In holding that in New Zealand the registered proprietor must prove some "distinct interest" in the land on which to base a caveat, he cited the example of an unpaid vendor: *Great West Permanent Loan Co. v. Friesen & Ors.* [1925] AC 208: "This was an unregistered transaction which gives rise to a distinct beneficial interest in the registered proprietors as unpaid vendors and (at p. 216) Sir Adrian Knox, in delivering the judgment of their Lordships, adverted to the fact that caveats could have been lodged to protect the interest of the registered proprietor". The above judgment of Richmond J left unresolved the question what is a "distinct interest" sufficient to support a caveat by a registered proprietor against his own land. The position is now governed by s. 74F(2), and a caveat may quite properly be lodged by a registered proprietor where his indefeasibility of title is threatened by the possibility of registration of some unauthorised dealing. Certainly, circumstances such as suspected theft of a certificate of title, can, and do, arise, making it expedient for the registered proprietor, by lodging a caveat, to prevent registration of any forged dealing which could deprive him of his land: *Frazer v. Walker* [1967] 1 AC 567. However, in such circumstances, it is also proper to request the Registrar-General to record his own caveat under the provisions of s. 12(1) of the R.P. Act, to eliminate the possibility of a forged withdrawal of caveat.

In *Mir Bros Projects Pty. Ltd. v. 1924 Pty. Ltd.* [1980] 2 NSWLR 907, - another New South Wales case - a caveat claimed or an "estate or interest as registered proprietor", and Powell J expressed no concluded opinion on the question. His Honour pointed out that, whilst there was a definition of "proprietor" in s. 3 of the R.P. Act, there was no definition of "registered proprietor", and said at p. 922: "I would not wish it to be thought that, by not dealing with the matter, I necessarily assent to the view that to claim an 'estate or interest as registered proprietor' is, for the purposes of s. 72, a sufficient statement of the estate or interest claimed by a caveator". However, his Honour held that a caveat by a mortgagor seeking to prevent the registration of any dealing affecting the land went far beyond what it might legitimately claim was necessary to protect such rights as, for example, those conferred on a mortgagor by s. 57 of the Act, and was improperly lodged.

Nearer home, the position in this country is regulated by s. 323(1)(a) of the Code which says:

> The persons and bodies at whose instance a private caveat may be entered are-
>
> (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;

There are two conflicting decisions of the High Court which dealt with the point; namely, *Eu Finance Bhd. v. Siland Sdn. Bhd. (Intervener)* [1989] 2 MLJ 24, 28 where L.C. Vohrah J held that a registered proprietor, merely as registered proprietor, was not entitled to caveat his own land. In the words of the learned Judge:

I do not think Siland (that is the defendant) can successfully bring itself within this first limb in the light of its plain meaning because in my view a person who relies on his status as registered owner must necessarily be a person already possessing title or interest in the land and not merely a person claiming title to or any interest in that land and must as a matter of logic have been excluded by the language of s. 323(1).

The opposite opinion was expressed by Tallala, JC (as he then was) in *Hiap Yiak Trading Sdn. Bhd. & Ors v. Hong Soon Seng Sdn. Bhd.* [1990] 2 CLJ (Rep) 117.

The opinion of Tallala, JC has come under heavy criticism by Mr. Teo Keang Sood in his well researched article. "*Caveating one's own Land: Cold Comfort for the Registered Proprietor*" [1991] 1 MLJ xxxiv.

With respect, I would express a preference for the opinion expressed by Vohrah J for the cogent reasons given by Mr. Teo Keang Sood.

The next point to consider is whether having made a search of the register document of title just before the auction sale was held and the 10% deposit of the purchase price paid, it was necessary for the purchaser to have made a second search just before completion because had he done so he would have discovered that there was the appeal by the chargor against the decision of the Senior Assistant Registrar pending in this Court and the date of hearing thereof.

Generally, certain searches must be made by a purchaser in order to comply with the standard of prudence required of purchasers if they are to be unaffected by notice. In practice, there are two series of searches to be made; the preliminary searches and the final searches. The preliminary searches are made before the purchaser enters into a legally binding contract with the vendor. In ordinary sale and purchase transactions, - as opposed to statutory sale by public auction - preliminary searches should be made in time for requisitions arising therefrom to be made within the time limited by the contract of sale. Final searches are searches made as shortly before completion as possible, preferably on the day of completion itself or better still within an hour of completion, their purpose being to uncover some flaw in title which has arisen since the preliminary searches and the making of the requisitions on title.

In the case of a statutory sale by public auction held pursuant to an order for sale under s. 256(3) of the Code the preliminary searches by an intending bidder would be necessary to comply with the standard of prudence required of him; the discovery at that stage of a flaw in the title, would spare him the expense and trouble in attending and participating in the bidding exercise at the public auction. However, I am not at all sure whether it would be necessary for an intending bidder to conduct the final searches, because it could be said that he was entitled to rely on the fact that the sale was being conducted under the supervision of an officer of the Court. He would have no reason to suppose that such a search would be necessary. In other words, I do not consider that the purported lodging of the caveat in this case constituted notice to the purchaser of the chargor's appeal. The purchaser in my view was entitled to actual notice of the appeal.

But, what is more to the point, having regard to the issues which arise for decision upon this application, is what is the remedy to which the chargor is entitled assuming he is correct in his contentions that the sale was at a gross undervalue.

Since reserving judgment I have uncovered certain authorities which I have found to be considerable assistance on this point. The cases referred to involve mortgagees but no doubt the same principles apply in the case of chargees.

It is settled law that a chargee in exercising the power to sell under the Code owes a duty to a chargor which flows from equity's recognition that a chargor has an interest in the surplus (if any) arising from the sale.

The issue of the appropriate standard of care owed by the chargee to the chargor is not free from difficulty.

One line of authority is to the effect that a mortgagee's only duty is to act *bona fide* in the conduct of sale. ( See *Kennedy v. De Trafford* [1897] AC 180; *Warner v. Jacob* [1881] 20 Ch D 220). In the latter case, Kay, J said at p. 224:

> A mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realise his debt. If he exercises it *bona fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud.

In the Australian case of *Pendlebury v. Colonial Mutual Life Assurance Society Ltd.* [1912] 13 CLR 676, 699 Isaacs, J stated that "so long as (the mortgagee) observed specified formalities and acts in good faith his conduct cannot be challenged."

The opposite line of authority is exemplified by the English Court of Appeal case of *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.* [1971] Ch 949 where Salmon LJ based the obligation of the mortgagee, not on a standard of behaviour imposed by equity but on a legal duty based on the tort of negligence and stemming from the proximity of the mortgagor and the mortgagee. What his Lordship said was this:

> Surely they are 'neighbours'. Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale ...

In Australia, the controversy as to which test is the appropriate test to apply - the more stringent test laid down in *Cuckmere* setting a higher standard for the mortgagee or the more relaxed test laid down in *Pendlebury* - remains to be resolved by the High Court.

I note, however, that in the Hong Kong Privy Council case of *Tse Kwong Lam v. Wong Chit Seng* [1983] 1 WLR 1349 their Lordships accepted the *Cuckmere* test. I would respectfully do the same.

On the merits of the sale, matters which require scrutiny by the Court are the organisation of the sale, and in particular the price received (*Dimmick v. Pearce Investment Pty. Ltd.* [1980] 43 FLR 235); the extent and content of advertising (*Pendlebury; Cuckmere ibid*); the extent of the mortgagee's attention to potential purchasers and possible competition between actual purchasers and potential purchasers (*Forsyth v. Blundell* [1973] 129 CLR 477); and the relationship if any, between the mortgagee and the purchaser. (See *The Australian and New Zealand Banking Group Ltd. v. Bangadilly Pastoral Co. Pty. Ltd.* [1978] 52 ALJR 529.)

There is authority for saying that a sale at an undervalue is not automatically set aside. (See *Davis v. Taytlor* [1948] 48 SR (NSW) 514; *Kennedy v. De Trafford* [1897] AC 180). But, the undervalue may be so gross as to indicate fraud or, at least, want of proper standards of care. (See *Campbell v. Campbell* [1916] 21 CLR 308 ). The case of *Khoo Cheong Puay v. The Overseas Banking Corp. Ltd. & Ors.* [1935] MLJ 93 shows how difficult it is to have a sale set aside on the ground of undervalue for there Mills, J, said "to set aside a sale on the ground of gross undervalue, such undervalue must, at the date of the contract of sale, be sufficiently gross to be itself conclusive and decisive evidence of fraud".

There is also authority for saying that the concept of market value is relative and depends upon the market in question.

Kelly J in *Dimmick v. Pearce* [1980] 43 FLR 235, 240 drew attention to the fact that the market value for properties at a mortgage sale may not be the same as it would be for the same properties if they were sold privately in the following terms:

> The vendor willing to sell for a fair price but not desirous to sell...is hardly the equivalent of a mortgagee exercising a power of sale concerned, within the limits applicable, for his own interests only nor ... is a purchaser at such an auction necessarily to be equated with the ordinary purchaser willing to purchase.

Upon the facts in the present case, although it is true that there is a wide disparity in the opinion evidence of the rival experts as to the true market value of the property at the time of the auction sale, it is noteworthy that neither expert has expressed his opinion on the basis of a statutory sale by public auction. I am not prepared to hold that the sale if it was at an undervalue at all, was at such an undervalue as to indicate fraud or want of proper standards of care as to justify the sale being set aside.

Ooi Choon Lye's bid was one of 11. Free market forces were at work and this was after all a sale pursuant to an order made in a charge action and not a private sale.

Ooi Choon Lye had no reason to suppose that the price at which the property was knocked down to him, which was RM600 above the reserve price, was anything but a fair market price.

Before me, no attempt was made to attack the organisation of the sale nor had fraud of any sort been even alleged. Moreover, the chargor's lack of diligence had been deplorable; he never attended the hearing before the SeniorAssistant Registrar when the reserve price was fixed and never obtained a stay after filing his notice of appeal. He offered no satisfactory proof of service of notice of hearing of his appeal upon Ooi Choon Lye whose nominee the purchaser was. He did however lodge an invalid caveat, but that was one month after the auction sale when there was already in being a binding contract of sale and purchase.

In the circumstances, the chargor's remedy (if any) should be confined to a claim sounding in damages, against the chargee. I need hardly add that whether or not he would succeed in this must abide the result of a hearing upon the merits in separate proceedings.

The result therefore is that, being satisfied that the purchaser was denied the opportunity of being heard at the chargor's appeal, the purchaser is entitled to succeed in his application to reinstate the sale by public auction of the property held on 12 July 1989 and I would decree that upon payment of the balance of the purchase price of RM131,400 to the chargee or its solicitors within one month from date hereof, there must be orders in terms of prayers 2, 3, 4 and 6 thereof.

Also found at [1992] 2 CLJ 1175